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PUAN SAAD v. PP

HIGH COURT MALAYA, ALOR SETAR
MAHAZAN MAT TAIB JC
[CRIMINAL APPLICATION NO: KA-44-25-07-2020]
23 AUGUST 2020

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CRIMINAL PROCEDURE: *Bail – Granting of – Application for – Whether accused charged with serious offence – Consideration of age, sex and state of health of accused – Whether unjust and unfair to deprive accused of liberty during pendency of criminal proceeding against her – Whether court ought to exercise discretion in favour of accused – Criminal Procedure Code, s. 388*

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The accused/applicant ('accused') together with two other persons was charged before the Magistrate's Court for an alleged offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), punishable under s. 39B(2) of the same Act read together with s. 34 of the Penal Code for being in joint possession of 780.18g of heroine. No bail was allowed. The accused filed for bail pursuant to s. 388 of the Criminal Procedure Code ('CPC') before this court. The applicant was arrested together with the other accused persons in a car while she was seated at the back as a passenger. She was the mother of the first accused and the second accused, of whom one of them was the one who drove the car. In her affidavit in support of her application, the applicant stated that she had no knowledge whatsoever about the drugs that was found in the car booth. The issue that arose was whether this was a proper case for the court to exercise its discretion in favour of the accused.

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Held (allowing application):

(1) The accused was charged with a serious offence. Nevertheless, the proviso in s. 388 of the CPC mentioned age, sex and the state of health of the accused that the court may consider to use its discretion to release them on bail. The accused was a woman aged 68 years old. During the hearing, the physical condition and the appearance of the accused while sitting in the dock was highlighted, in that she indeed looked sickly, especially after months of staying in prison for her remand awaiting trial. Where the accused had already been in custody and the trial was not likely to conclude for some time, this may affect the health of an aged woman like the applicant. The time lag between the date of occurrence and the conclusion of the trial and undue delay in the trial of the case would contribute to the poor health of the applicant. (paras 18, 19, 25 & 29)

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(2) The primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure her appearance at the time of trial and to make sure if the accused is held guilty, she is available to suffer the consequences of the offence as such committed,

in terms of punishment in accordance with the law. It would be unjust and unfair to deprive the alleged accused of her liberty during the pendency of the criminal proceeding against her, especially when the proviso of s. 388(1) allowed in this case, the aged person and a woman with a health issue to be granted bail. (para 30)

(3) The release on bail upon appropriate considerations and imposition of reasonable condition was significant for the court to use its discretion in allowing an accused to be released on bail. Hence, the court was duty-bound to contemplate the facts and circumstances prevailing in the matter and to strike a balance between considerations and impositions of the reasonable conditions and then pass the appropriate order. Thus, the accused was released on bail on the following conditions (i) bail sum of RM10,000 with two sureties; (ii) passport to be surrendered to the court; and (iii) the applicant shall report to the police station at any time she intends to leave Alor Setar for any reason. (paras 31 & 32)

Case(s) referred to:
Che Su Daud v. PP [1978] 1 LNS 23 HC ***(refd)***
PP v. Chew Siew Luan [1980] 1 LNS 210 ***(refd)***
PP v. Latchemy [1967] 1 LNS 126 HC ***(refd)***
PP v. Wee Swee Siang [1948] 1 LNS 49 HC ***(refd)***

Legislation referred to:
Criminal Procedure Court, s. 388(1), (2)
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), 41B(1)(c), (2)
Penal Code, s. 34

For the appellant - Naran Singh Asa Singh; M/s Naran Singh & Co
For the respondent - Arif Hakimi Abdul Hamid; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Mahazan Mat Taib JC:

[1] In this case, Puan binti Saad ("the accused/the applicant") together with two other persons were charged on 27 June 2020 before Magistrate's Court Alor Setar for an alleged offence of trafficking in dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") punishable under s. 39B(2) of the same Act read together with s. 34 of the Penal Code for being in joint possession of 780.18g of heroin. The charge read as follows:

> Bahawa kamu bersama-sama pada 19hb. Jun 2020 lebih kurang 6.00 petang di bahu Jalan Batu 2, Jalan Datuk Kumbar, 05300 Alor Star, di dalam daerah Kota Setar di dalam Negeri Kedah telah didapati memperedarkan dadah berbahaya iaitu jenis 'Heroin' seberat 780.18 gram. Oleh yang demikian itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

[2] No bail was allowed.

[3] The accused/applicant then filed for bail pursuant to s. 388 of the Criminal Procedure Court ('CPC") before this court. The material parts of the section read as follows:

> Section 388(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court, he may be released on bail by the officer in charge of the police district or by that court, but he shall not be released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
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> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.
>
> (2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

[4] Section 41B of the Dangerous Drugs Act 1952 denies bail for persons charged with offences under the Act that carries the death sentences or sentences of more than five years' imprisonment. Section 41B states as follows:

> (1) Bail shall not be granted to an accused person charged with an offence under this Act:
>
> (a) Where the offence is punishable with death;
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> (b) Where the offence is punishable with imprisonment for more than five years; or
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> (c) Where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused.
>
> (2) Subsection (1) shall effect notwithstanding any other written law or any rule of law to the contrary.

[5] Sub-paragraph 41B(1)(c) of DDA states clearly that, "Where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person". Subsection (2) further emphasises that no other legal provision can interfere with this provision and this shall means that this provision stands on its own.

[6] That provision would mean that the Public Prosecutor will decide, and the accused has to stay in detention until the trial is over and the court decides whether he/she is guilty or not. Paragraph 41B(1)(c) gives the power of denial of bail to the Public Prosecutor, who simply has to certify "in writing that it is not in the public interest to grant bail to the accused person". In other words, the court's power to decide on bail is simply ousted. It goes further in sub-s. (2) to state that this provision prevails over any other written law.

[7] However, I am of the view that the court's role should not be put aside and taken lightly. This is because the court in deciding whether bail is to be granted or denied to an accused in any particular case, the court will look from various aspects. Not wanting to ignore the spirit of the provision in s. 41B, it has to be noted that the purpose of bail is simply that the accused person be released on condition that he turns up in court on the dates fixed for his/her case. In this manner, in any bail applications, the courts should and do consider all the arguments of the prosecutor and also the accused persons. Upon taking into account all relevant facts and the law, then the court should be allowed to decide whether bail be granted or not, and if granted on what conditions. Having said that, I will then go further on the issue before the court today.

[8] In the case before us today, the accused/applicant was arrested together with the other accused persons in a car while she was seated at the back as a passenger. She is the mother of the first accused and the second accused in this case, of whom one of them was the one who drove the car on the way back from Kota Bharu, Kelantan to her hometown Alor Setar, Kedah. In her affidavit in support of her application, she stated that she has no knowledge whatsoever about the drugs that were found in the car booth.

[9] At this juncture, it is to be highlighted here that sub-s. 388(1) of the CPC speaks only on the existence of reasonable grounds and not evidence, that he shall not be released on bail. Subsection 388(2) however mentioned that the court can release an accused on bail if the court finds that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt.

[10] The learned Deputy Public Prosecutor did not go further on whether or not there are reasonable grounds for believing that the accused has committed a non-bailable offence in order to assist the court to decide on the granting of bail.

[11] In this regard, I refer to *Che Su Daud v. PP* [1978] 1 LNS 23; [1978] 2 MLJ 162 where Gunn Chit Tuan J (as he then was) said at p. 163 (MLJ):

> But apart from stating that the fact that the accused/applicant has been charged showing that there was sufficient evidence against her, the learned Deputy Public Prosecutor was reluctant or unable to inform the

court of the nature of the evidence in support of the charge and considered that it was not right for the prosecution to disclose any evidence to the court at that stage. *I realised that at an early stage it was not possible to have evidence from the prosecution to establish the guilt of the accused beyond reasonable doubt* (see *Keshu Vasudeo Kortikar v. Emperor* AIR [1933] Bom 4920. *But since an application for bail had been made at an early stage the prosecution should satisfy the court that it would be able to produce good prima facie evidence in support of the charge.* (emphasis added)

[12] In our present case, since there is an application for a bail, the learned Deputy Public Prosecutor should satisfy the court that he has a good *prima facie* evidence to support the charge against the accused/applicant and that the release of the accused/applicant on bail would be prejudicial to the prosecution. However, that was not the case. The learned Deputy Public Prosecutor just relied on the provision of s. 41B DDA and the cases submitted to support the requirement in the section.

[13] The court is left to look at the *prima facie* material available in this application and should only go into the question of *prima facie* case established for granting bail. Since the application is made where the trial has not yet commenced, the court cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial.

[14] The court must limit itself to what has been submitted before it in relation to the application and decide the existence of the reasonable grounds of the application itself as mentioned in s. 388 of the CPC and not to what is going to be proven later. This court must take into consideration and give weight to the relevant facts and circumstances stated in the application. Whether or not the accused/applicant is to be granted bails depends on whether this is a proper case for the court to exercise its discretion in favour of the accused.

[15] The court would like to refer to the case of *PP v. Wee Swee Siang* [1948] 1 LNS 49; [1948] MLJ 114, where it stated that the followings factors are to be taken into consideration before bail is to be granted:

(i) whether there was or was no reasonable grounds for believing the accused guilty of the offence;

(ii) the nature of the offence charged;

(iii) the severity and degree of punishment that might follow;

(iv) the danger of the accused absconding if released on bail;

(v) his character, means and standing;

(vi) the danger of the offence being continued or repeated;

(vii) the danger of witnesses being tampered with;

(viii) opportunity to the accused to prepare his defence; and

(ix) the long period of detention of the accused and probability of further period of delay.

[16] The factors quoted in the case was referred to the *Mallal's Criminal Procedure* where in granting or refusing bail, various matters such as the nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State and similar other considerations.

[17] The matters for consideration in granting or refusing bail as set out in *Mallal's* was also quoted in the case of *Che Su Daud v. PP*, as follows:

(i) the nature and gravity of the offence charged;

(ii) the nature of the evidence in support of the charge;

(iii) whether there was or was no reasonable ground for believing the accused guilty of the offence;

(iv) the severity and degree of punishment which conviction might entail;

(v) the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;

(vi) the danger of the offence being continued or repeated;

(vii) the danger of the witnesses being tampered with;

(vii) whether the accused, if released on bail, is likely to tamper with the prosecution evidence;

(ix) whether the accused is likely to get up false evidence in support of the defence;

(x) the opportunity of the accused to prepare the defence;

(xi) the character, means and standing of the accused;

(xii) the long period of detention of the accused and probability of further period of delay.

[18] In this case, it is undeniable that the accused/applicant is charged with a serious offence. Nevertheless, the matters pointed out above are not exhaustive and not all of the factors are to be taken into consideration. The proviso in s. 388 of CPC mentioned about age, sex and the state of health of the accused that the court may consider to use its discretion to release them on bail.

[19] The accused/applicant in the present case is a woman aged 68 years old. In her affidavit in support of her application affirmed on 14 July 2020, the accused/applicant stated that:

> 7. Saya telah lahir pada 14/9/1952 dan sekarang berusia 68 tahun dan mengidap penyakit jantung dan darah tinggi.

[20] She went on further stated that:

> 10. Saya dengan rendah diri, memohon kepada Yang Ariff dalam hal keadaan terutama kesihatan saya dan umur saya, saya tidak dapat tinggal dalam penjara dan memohon saya diberi ikat jamin dan berjanji menurut apa-apa perintah dan arahan yang diberikan oleh Yang Arif Tuan Hakim.

[21] Learned counsel in his affidavit in support of the perakuan segera stated that:

> 2. Pemohon adalah seorang suri rumahtangga berusia 68 tahun dan mengidap sakit jantung dan darah tinggi.
>
> 4. Ada kemungkinan besar jika perkara ini tidak disegerakan perbicaraannya akan menjejaskan kesihatan beliau.

[22] During the hearing of this application, learned counsel submitted that there was only one objection by the Deputy Public Prosecutor in his affidavit in reply, stated as follows:

> 4. Saya telah merujuk kepada perenggan 6 Affidavit Sokongan bahawa pertuduhan yang dikenakan ke atas Pemohon di bawah seksyen 39B(1) Akta Dadah Berbahaya yang membawa hukuman mati atau hukuman penjara seumur hidup adalah suatu kesalahan yang tidak dijamin (unbailable) di bawah peruntukan undang-undang-undang sedia ada menerusi seksyen 41B Akta Dadah Berbahaya.

[23] The learned Deputy Public Prosecutor however replied in his oral submission and quoted the case of *PP v. Chew Siew Luan* [1980] 1 LNS 210; [1982] 1 MLJ 280 where it was held that the provisions regulating the granting of bail under the DDA must be construed in the context of that Act and not in that of the CPC and to that extent the general provisions of the CPC must be *ex necessitate* yield to the specific provisions of s. 41B of the DDA in that regard. The provision of s. 388 therefore does not overrides the provision of s. 41B of the DDA.

[24] In his affidavit in reply, the learned Deputy Public Prosecutor further stated that:

> 5. Saya terus merujuk kepada perenggan 7 Affidavit Sokongan dan menyatakan bahawa pembuktian adalah kepada Pemohon bagi membuktikan penyakit jantung dan darah tinggi yang dihidapinya serta keperluan bagi pemohon untuk tidak ditahan sementara menunggu perbicaraan.

[25] For this issue, the court noted that no medical reports whatsoever produced by the accused/applicant to support her statement in the affidavit. At this juncture, learned counsel in his oral submission brought the intention of the court to the fact that the accused/applicant being someone from kampung, despite being diagnosed with a heart problem and high blood pressure, never gone for any proper medical check-up and only takes traditional medication for her sickness. Hence, he was not able to produce the medical reports to support his statement on the accused/applicant's health. However, during the hearing, the physical condition and the appearance of the accused/applicant while sitting in the dock was highlighted by learned counsel. Although there was no evidence shown to the court on her medical condition, at the age of 68, the court noted that the accused/applicant was indeed looked sickly on that day, especially after months of staying in the prison for her remand awaiting the trial.

[26] The learned Deputy Public Prosecutor referred to the case of *PP v. Latchemy* [1967] 1 LNS 126; [1967] 2 MLJ 79 in which the ground for application for bail that the accused was "a mother of ten children and the youngest of them is still breast-feed" was rejected by the High Court on the reason that it was not exceptional and not very special reason. In that case, the accused's bail which was granted earlier by the Magistrate's Court was turned down by the High Court. The judge found that it was not exceptional and not very special reasons to warrant a release on bail of the accused/applicant.

[27] However, I agree with the reason given by the learned judge in the case of *Che Su binti Daud*, where he distinguished that case of *Latchemy*'s on the ground that the accused/applicant in *Che Su* was not charged alone but has been jointly charged with her husband and her brother for trafficking in dangerous drugs. The penalty for the offence was punishable with death or life imprisonment unlike Latchemy who was charged alone with murder which is punishable with death penalty only. In our present case, the accused/applicant was jointly charged with three other accused persons for trafficking in dangerous drugs. For this reason too, I am of the view that the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence can be taken into consideration by the court to further distinguish between the cases.

[28] The scenario where the applicant has already been in custody and the trial is not likely to conclude for some time, which can be characterised as unreasonable, though not necessary that bail shall be granted. The factors such as, previous conduct and behaviour of the accused in the court, the period of detention of the accused and health, age and sex of the accused also may be considered at the time of grant of bail.

[29] The court is of the view that where the accused/applicant has already been in custody and the trial is not likely to conclude for some time may affect the health of an aged woman like the accused/applicant in this case. The time lag between the date of occurrence and the conclusion of the trial and undue delay in the trial of the case will contribute to the poor health of the accused/applicant.

[30] The court has taken into consideration the overall circumstances of the case and the nature of the case. Having said all of the above, the court believes that the primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure her appearance at the time of trial and to make sure if the accused is held guilty, she is available to suffer the consequence of the offence as such committed, in terms of punishment in accordance with the law. It would be unjust and unfair to deprive the alleged accused of her liberty during the pendency of the criminal proceeding against her, especially when the proviso of sub-s. 388(1) allows in this case, the aged person and a woman with a health issue to be granted bail.

[31] The release on bail upon appropriate considerations and imposition of reasonable condition is significant for the court to use its discretion in allowing an accused to be released on bail. Hence, the court is duty-bound to contemplate the facts and circumstances prevailing in the matter and strike a balance between considerations and imposition of the reasonable conditions and then pass the appropriate order.

[32] In the circumstances of the case, I therefore allow this application and order for the accused/applicant to be released on bail on the following conditions:

(i) bail sum of RM10,000 with two sureties;

(ii) passport to be surrendered to the court, if any;

(iii) the applicant shall report to the police station at any time she intends to leave Alor Setar for any reason.